



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 159

[Docket ID: DoD-2020-OS-0016]

RIN 0790-AK87

Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The DoD is finalizing updates to this rule resulting from changes from the National Defense Authorization Act (NDAA) for Fiscal Years (FY) 2017 and 2020 as well as DoD policy updates. These changes include administrative updates and clarifications to private security contractors (PSCs) performing duties while under contract to DoD in support of a contingency operations, humanitarian or peace operations, or other military operations or exercises.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Donna M. Livingston, 703-692-3032, donna.m.livingston.civ@mail.mil.

SUPPLEMENTARY INFORMATION:

LEGAL AUTHORITY

This section of the CFR was last updated in a final rule published in the *Federal Register* (76 FR 49650) on August 11, 2011. DoD is finalizing this rule to meet the mandates of NDAA for FY 2017 and 2020 and updates to DoD policy that require the Department to

propose additional guidance on inherently governmental functions, PSC compliance with national and international recognized quality assurance management standards, and to add new definitions for total force and arming authorities. DoD also added language requiring PSCs to cooperate with DoD on all U.S. Government investigations. Additional language is also provided to state DoD is responsible for providing the appropriate contract administration oversight of PSCs.

The corresponding internal DoD policy is established in DoD Instruction 3020.50, “Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises,” published on July 22, 2009, and last updated on August 31, 2018. This Instruction will be updated based on publication of this final rule. For additional information, DoD Instruction 3020.50 can be accessed at

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302050p.pdf>.

DISCUSSION OF COMMENTS

A proposed rule titled “Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises” was published in the *Federal Register* (86 FR 28042) on May 25, 2021.

Two commenters provided comments and the Department’s responses are as follows.

Comment: One comment discussed operational energy-related issues including registering activities involved with maintenance and security of the electrical grid, coordinating the activities of other U.S. Government entities operating in the area of operation, and coordinating with the host government on matters related to infrastructure in the area of operation.

Response: While the Department appreciates the comment, it does not specifically address private security contractors and does not require a change to the rule.

Comment: The second comment was supportive of the rule and suggested the new guidance be made readily available to all contractors. The commenter also opined that these policies should be strictly enforced with increased penalties for those that do not follow the requirements of the rule.

Response: The Department appreciates the comment. The new guidance will be made available to the contractors through publication on public websites and will be shared with the contracting community and industry groups to support wider dissemination. Enforcement and penalties are not decided at the Department level. They must be considered and assessed on an individual contract basis.

As no public comment required changes to the rule, the Department is finalizing the rule with minor administrative edits to provide additional clarity.

EXPECTED IMPACT OF THE FINAL RULE

As no public comment was received on the economic analysis of the proposed rule, the Department is finalizing this section with no changes. Separate from this amendment rule, contractors are required to report certain types of incidents to the combatant commander (CCDR) with the geographic area of responsibility (AOR) in which they are assigned and in accordance with orders and instructions established by those commanders.

TOTAL COSTS FOR NON-GOVERNMENT AND GOVERNMENT

The Office of the Secretary of Defense (OSD) subject matter experts on contractors performing private security functions have estimated an average of 4 incidents per month or 48 incidents (responses) per year from 12 respondents. Based on the nature of the task, the subject matter experts determined that it takes approximately 30 minutes for each contractor to retrieve, prepare, and submit the information for each incident report. Based on our assessment, the complexity of the reporting requirement is equivalent to that of a GS-11, step 5. See the rate calculation below. The estimated annual cost to

contractors for receiving, preparing, and submitting the information for incidents is as follows:

Estimation of Respondent Burden Hours: Office of Management and Budget (OMB) Control Number 0704-0549	
Number of respondents	12
Responses per respondent	4
Number of responses (a)	48
Hours per response (b)	.5
Estimated hours (number of responses multiplied hours per response)	24
Cost per hour (c)	\$45
Total cost to respondents	\$1,080

We estimate that the U.S. Government receives approximately 48 contractor incident reports each year. According to OSD subject matter experts on contractors performing private security functions, it takes approximately 30 minutes for the U.S. Government to receive, review, and analyze the information for each incident reported by a contractor. Based on our assessment, the complexity of the work is equivalent to that of a GS-11, step 5. See the rate calculation below. The estimated annual cost to the U.S. Government for receiving, reviewing, analyzing, and forwarding the information submitted by the contractor is as follows:

Estimation of Federal Government Burden Hours: OMB Control Number 0704-0549	
Number of responses (a)	48
Hours per response (b)	.5
Estimated hours (number of responses multiplied hours per response)	24
Cost per hour (c)	\$45
Annual Federal Government burden (estimated hours multiplied by cost per hour)	\$1,080

The hourly rate was calculated by adding an overhead factor of 36.25 percent (taken from OMB Memo M-08-13, which provides standard cost factors for agency use) to the calendar year 2019 Office of Personnel Management rate for the Rest of the United States for a GS-11, step 5; \$33.24.

Labor rate calculation:

Cost per hour	
GS-11, step 5 as follows	\$33.24
OMB burden @ 36.25%	\$12.05

Total	\$45.29
Total Rounded to nearest whole dollar	\$45.00

A. Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

These Executive orders direct agencies to assess all costs, benefits, and available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). These Executive orders emphasize the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “non-significant regulatory action” under section 3(f) of Executive Order 12866.

B. Congressional Review Act (5 U.S.C. 801 et seq.)

Pursuant to the Congressional Review Act, this rule has not been designated a major rule, as defined by 5 U.S.C. 804(2).

C. Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

The Under Secretary of Defense for Acquisition and Sustainment certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

D. Sec. 202, Public Law 104-4, “Unfunded Mandates Reform Act”

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of \$100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

E. Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that this amendment rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. There is an existing information collection for 32 CFR part 159 that has been reviewed and approved by the OMB under OMB Control Number 0704-0549, “Defense Federal Acquisition Regulation Supplement, part 225, Foreign Acquisition, and Defense Contractors Performing Private Security Functions Outside the United States.” The amendments to this rule neither increase nor decrease the public burden nor cost to the Federal Government associated with this collection.

F. Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This rule will not have a substantial effect on State and local governments.

G. Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or effects the distribution of power and responsibilities between the Federal Government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

List of Subjects in 32 CFR Part 159

Government contracts, Reporting and recordkeeping requirements, Security measures.

Accordingly, 32 CFR part 159 is amended as follows:

**PART 159—PRIVATE SECURITY CONTRACTORS (PSCs) OPERATING IN
CONTINGENCY OPERATIONS, HUMANITARIAN OR PEACE OPERATIONS,
OR OTHER MILITARY OPERATIONS OR EXERCISES**

1. The authority citation for part 159 is revised to read as follows:

Authority: Sec. 862, Pub. L. 110-181, 122 Stat. 253; Sec. 832, Sec 853, Pub. L. 110-417, 122 Stat. 4535; Sec. 831-833, Pub L. 111-383, 124 Stat. 4276.

2. Revise the heading for part 159 to read as set forth above.

3. Amend §159.2 by:

a. In paragraph (a)(1):

i. Adding “(CJCS)” after “Office of the Chairman of the Joint Chiefs of Staff”.

ii. Adding “(DoD)” after “the Office of the Inspector General of the Department of Defense”.

iii. Removing “organizational entities in the Department of Defense” and adding in its place “organizational entities in the DoD”.

b. Revising paragraph (a)(2).

c. Adding paragraph (a)(3).

d. Revising paragraph (b)(1).

e. In paragraph (b)(2), removing “USG-funded” and adding in its place “U.S.G.-funded”.

The revisions and addition read as follows:

§159.2 Applicability and scope.

* * * * *

(a) * * *

(2) The Department of State and other U.S. Federal agencies insofar as it implements the requirements of section 862 of Public Law 110-181, as amended. Specifically, in areas

of operations which require enhanced coordination of PSC and PSC personnel working for U.S. Government (U.S.G.) agencies, the Secretary of Defense may designate such areas as areas of combat operations or other significant military operations for the limited purposes of this part. In such an instance, the standards established in accordance with this part would, in coordination with the Secretary of State, expand from covering only DoD PSCs and PSC personnel to cover all U.S.G.-funded PSCs and PSC personnel operating in the designated area.

(3) The requirements of this part shall not apply to a nonprofit nongovernmental organization receiving grants or cooperative agreements for activities conducted within an area of other significant military operations if the Secretary of Defense and the Secretary of State agree that such organization may be exempted. An exemption may be granted by the agreement of the Secretary of Defense and the Secretary of State under this paragraph (a)(3) on an organization-by-organization or area-by-area basis. Such an exemption may not be granted with respect to an area of combat operations.

(b) * * *

(1) DoD PSCs and PSC personnel on contract and subcontract, at any tier, performing private security functions in support of contingency operations, humanitarian or peace operations, or other military operations or exercises outside the United States.

* * * * *

4. Amend §159.3 by:

- a. Adding the definition of “Arming authority” in alphabetical order.
- b. Revising the definition of “Contingency operation,” “Covered contract,” “Other significant military operations,” and “Private security functions”.
- c. Removing the definition of “PSC”.
- d. Adding the definitions of “Private Security Contractor (PSC)” and “Total Force” in alphabetical order.

The revisions and additions read as follows:

§159.3 Definitions.

* * * * *

Arming authority. A Combatant Commander (CCDR) with responsibility for the applicable geographic area concerned, or a person or persons designated by that Commander who can authorize the arming of civilians under their authority or supervision for security functions or to permit the carrying of firearms for personal protection in support of operations outside the United States.

Contingency operation. Per 10 U.S.C. 101(a)(13)(a), a military operation that is designated by the Secretary of Defense as a contingency operation, or that becomes a contingency operation as a matter of law in accordance with 10 U.S.C. 101(a)(13)(b).

* * * * *

Covered contract. (1) A DoD contract for performance of services and/or delivery of supplies in an area of contingency operations, humanitarian or peace operations, or other military operations or exercises outside the United States or non-DoD Federal agency contract for performance of services and/or delivery of supplies in an area of combat operations or other significant military operations, as designated by the Secretary of Defense; a subcontract at any tier under such contracts; or a task order or delivery order issued under such contracts or subcontracts.

(2) Excludes temporary arrangements entered into by non-DoD contractors for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company.

Other significant military operations. (1) Activities, other than combat operations, as part of an overseas contingency operation that are carried out by U.S. Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force.

(2) With respect to an area of other significant military operations, the requirements of this part shall apply only upon agreement of the Secretary of Defense and the Secretary of State. Such an agreement of the Secretary of Defense and the Secretary of State may be made only on an area-by-area basis. With respect to an area of combat operations, the requirements of this part shall always apply.

Private security functions. Activities engaged in by a contractor under a covered contract as follows:

(1) Guarding personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of their contract. For the DoD, DoD Instruction 3020.41, “Operational Contract Support (OCS)” (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302041p.pdf>) prescribes policies related to personnel allowed to carry weapons for self-defense.

(3) Contractors, including those performing private security functions, are not authorized to perform inherently governmental functions. In this regard, armed contractors are limited in the use of force to a defensive response to hostile acts or demonstrated hostile intent.

Private Security Contractor (PSC). A company contracted by the U.S.G. to perform private security functions under a covered contract.

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Total Force. The organizations, units, and individuals that comprise DoD’s resources for implementing the National Security Strategy. It includes the DoD Active and Reserve Component military personnel, DoD civilian personnel (including foreign national direct-hires as well as non-appropriated fund employees), contracted support, and host nation support personnel.

§159.4 [Amended]

5. Amend §159.4 by:

a. In paragraph (a):

i. Adding “as amended,” after “Public Law 110-181,”.

ii. Removing “section 159.5 of this part” and adding in its place “§159.5”.

b. In paragraph (b):

i. Removing “Geographic Combatant Commanders” and adding in its place “Combatant Commanders (CCDRs) with geographic Areas of Responsibility (AORs)”.

ii. Redesignating footnotes 4 and 5 as footnotes 1 and 2.

c. In paragraph (c):

i. Removing “geographic Combatant Commander” and adding in its place “CCDR for the applicable geographic AOR” wherever it appears.

ii. Adding “(COM)” after “the relevant Chief of Mission” in the first sentence.

iii. Removing “Chief of Mission” and adding in its place “COM” in the second sentence.

6. Revise §159.5 to read as follows:

§159.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) will provide Department-wide policies on the total force manpower mix and labor sourcing, consistent with U.S law, the FAR, the DFARS, and other applicable Federal policy documents, especially with respect to contracted services and restrictions on functions that contractors may and may not perform. The USD(P&R) will ensure that policies specifically address circumstances where use of PSCs would be inherently governmental or where CCDRs with geographic AORs would need to assess where performance of the function by PSCs or total reliance on PSCs would constitute an unacceptable risk.

(b) The Deputy Assistant Secretary of Defense for Logistics (DASD(Logistics)), under the authority, direction, and control of the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) and through the Assistant Secretary of Defense for Sustainment, monitors the registering, processing, and accounting of PSC personnel in areas of contingency operations, humanitarian or peace operations, or other military operations or exercises.

(c) The Principal Director, Defense Pricing and Contracting (DPC), under the authority, direction, and control of the USD(A&S) and through the Assistant Secretary of Defense for Acquisition, ensures that the DFARS and (when appropriate, in consultation with the other members of the FAR Council) the FAR, provides appropriate guidance and publishes contracting requirements pursuant to this part and section 862 of Public Law 110-181.

(d) The CJCS shall ensure that joint doctrine is consistent with the principles established by DoD Directive 3020.49, “Program Management for the Planning and Execution of Operational Contract Support” (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/302049d.pdf?ver=fgxC1kzBqeIV4KpOv9pDTw%3d%3d>); DoD Instruction 3020.41, DoD Directive 5210.56, “Arming and the Use of Force” (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/521056p.PDF?ver=PIvIb3eht0obgolnD0UCEw%3d%3d>); and this part.

(e) CCDRs with responsibility for the AOR in which contingency operations, humanitarian or peace operations, or other military operations or exercises are occurring, and within which PSCs and PSC personnel perform under covered contracts, shall:

- (1) Provide guidance and procedures, as necessary and consistent with the principles established by DoD Directive 3020.49, DoD Instruction 3020.41, DoD Instruction 1100.22, “Policy and Procedures for Determining Workforce Mix” (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/110022p.pdf>);

DFARS, 48 CFR 225.302, and this part, for the selection, training, accountability, and equipping of such PSC personnel and the conduct of PSCs and PSC personnel within their AOR. Individual training and qualification standards shall meet, at a minimum, one of the Military Departments' established standards. Within a Combatant Command (CCMD) with a designated geographic AOR, a sub unified commander or JFC shall be responsible for developing and issuing implementing procedures as warranted by the situation, operation, and environment, in consultation with the relevant COM in designated areas of combat operations or other significant military operations.

(2) Through the Contracting Officer, the PSC should acknowledge that its personnel understand their obligation to comply with the terms and conditions of applicable covered contracts.

(3) Issue written authorization to the PSC identifying individual PSC personnel who are authorized to be armed. Rules for the Use of Force shall be included with the written authorization, if not previously provided. Rules for the Use of Force shall conform to the guidance in DoD Directive 5210.56 and the CJCS Instruction 3121.01B, "Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces." Offerors' and contractors' access to the Rules for the Use of Force may be controlled in accordance with the terms of FAR, 48 CFR 52.204-2, "Security Requirements"; DFARS, 48 CFR 252.204-7000, "Disclosure of Information"; or both.¹

¹ CJCS Instruction 3121.01B provides guidance on the standing rules of engagement (SROE) and establishes standing rules for the use of force for DoD operations worldwide. This document is classified secret. CJCS Instruction 3121.01B is available via Secure Internet Protocol Router Network at <https://jsportal.osd.smil.mil>.

(4) Ensure that the procedures, orders, directives, and instructions prescribed in §159.6 are available through a single location (including an Internet website, consistent with security considerations and requirements).

(f) The Heads of the DoD Components shall:

(1) Ensure that all private security-related requirement documents are in compliance with the procedures listed in §159.6 and the guidance and procedures issued by the CCMD of the applicable geographic AOR.

(2) Ensure private security-related solicitations and contracts contain the appropriate clauses in accordance with the applicable FAR and DFARS clauses and include additional mission-specific requirements as appropriate.

(3) In coordination with the appropriate requiring activity (or activities), ensure the head of the contracting activity responsible for each covered contract takes appropriate steps to assign sufficient oversight personnel to the contract to verify that the contractor responsible for performing private security functions complies with the requirements of this part. This includes ensuring that the contracting officer coordinates with the requiring activity to nominate and appoint a qualified contracting officer's representative (COR) or other multiple or alternate CORs, in accordance with DoD Instruction 5000.72, "DoD Standard for Contracting Officer's Representative (COR) Certification" (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/500072p.pdf>).

7. Amend §159.6 by:

a. Revising paragraph (a) introductory text.

b. In paragraph (a)(1)(i), removing “, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces.”” and adding a period in its place.

c. In paragraph (a)(1)(iii) introductory text:

- i. Removing “geographic Combatant Commander” and adding in its place “CCDR of the geographic AOR” wherever it appears.
- ii. Removing “of this part”.
- d. In paragraph (a)(1)(iii)(C):
 - i. Removing ““Guidance for Determining Workforce Mix,”” and adding in its place ““Policy and Procedures for Determining Workforce Mix,””.
 - ii. Redesignating footnote 12 as footnote 1.
- e. In paragraph (a)(1)(iii)(F)(I), redesignating footnote 13 as footnote 2.
- f. In paragraph (a)(1)(iv), adding “PSC personnel, weapons,” before “armored vehicles”.
- g. In paragraph (a)(1)(v)(F), removing “TASER guns” and adding in its place “disruption devices”.
- h. In paragraph (a)(1)(viii), removing “commander of a combatant command may request” and adding in its place “CCDR may, through the contracting officer, request”.
- i. In paragraph (a)(1)(x), removing “paragraph (a)(2)(ii)” and adding in its place “paragraph (a)(2)(iii)”.
- j. In paragraph (a)(2)(i), removing “, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces.”” and adding a period in its place.
- k. Redesignating paragraphs (a)(2)(ii) through (iv) as paragraphs (a)(2)(iii) through (v) and adding new paragraph (a)(2)(ii).
- l. Further redesignating newly redesignated paragraph (a)(2)(v) as paragraph (a)(2)(vi) and adding new paragraph (a)(2)(v).
- m. In newly redesignated paragraph (a)(2)(vi), removing “Chief of Mission” and adding in its place “COM”.
- n. Removing paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c).
- o. In newly redesignated paragraph (b):

- i. Revising the paragraph heading.
 - ii. Removing “Chief of Mission” and “combatant command” and adding in their places “COM” and “CCDR”, respectively.
- p. In newly redesignated paragraph (c):
 - i. Revising the paragraph heading.
 - ii. Removing “Chief of Mission” and “geographic Combatant Commander/sub unified commander” and adding in their places “COM” and “CCDR with geographic AOR /sub unified commander”, respectively.

The revisions and additions read as follows:

§159.6 Procedures.

(a) *Standing Combatant Command (CCMD) guidance and procedures.* Each CCDR with a geographic AOR shall develop and publish guidance and procedures for PSCs and PSC personnel operating during contingency operations, humanitarian or peace operations, or other military operations or exercises within their AOR, consistent with applicable law; this part; applicable Military Department publications; and other applicable DoD issuances including DoD Directive 3020.49, DoD Instruction 1100.22, “Policy and Procedures for Determining Workforce Mix,” FAR, DFARS, DoD Instruction 3020.41, DoD Directive 2311.01E, “DoD Law of War Program” (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101p.pdf?ver=2020-07-02-143157-007>); DoD 5200.08-R, “Physical Security Program” (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/520008rm.pdf>); CJCS Instruction 3121.01B, , and DoD Directive 5210.56. The guidance and procedures shall:

* * * * *

(2) * * *

(ii) Assessing compliance with DoD approved business and operational standards for private security functions.

* * * * *

(v) Requirements for the PSC to cooperate with any investigation conducted by the DoD, including by providing access to its employees and relevant information in its possession regarding the matter(s) under investigation.

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(b) *Subordinate guidance and procedures.* * * *

(c) *Consultation and coordination.* * * *

Dated: August 29, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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